Supreme Court, U.S.
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In the Supreme Court of the United States

BAYOU FLEET, INC.

Petitioner

VERSUS

HOME PLACE BATTURE LEASING, INC., NEAL CLULEE, MARY CLULEE and N/C MATERIALS, INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Noerr-Pennington* immunity can be extended beyond Sherman Act antitrust claims to include civil rights claims under Section 1983?

2. Whether *Noerr-Pennington* immunity should protect a defendant in a Section 1983 case who retaliates against the plaintiff for exercising its First Amendment right to petition the courts?

3. Whether *Noerr-Pennington* immunity should protect a defendant involved in a Section 1983 civil rights conspiracy or joint participation scheme?

4. Whether a lawsuit can be dismissed on the basis of *Noerr-Pennington* immunity after a ruling is issued during trial prohibiting the defendants from amending their answer to allege it as an affirmative defense?

5. Whether a law clerk's improper participation in a non-jury trial creates an appearance of impropriety which deprives a litigant of meaningful access to the federal courts justifying a new trial?

6. Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Petitioner, Bayou Fleet, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

2. Respondent, Home Place Batture Leasing, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

3. Respondent, N/C Materials, Inc. It does not have a parent corporation, its stock is not publicly traded and there is no publicly held corporation owning any of its stock.

4. Respondent, Neal Clulee.

5. Respondent, Mary Clulee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Bayou Fleet, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled proceeding on November 28, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, dated November 28, 2000, is reprinted in the appendix. In addition, the following reported opinions were issued in the district court: 1) *Bayou Fleet v. Alexander*, 68 F.Supp.2d 734 (E.D. La. 1999); 2) *Bayou Fleet v. Alexander*, 26 F.Supp.2d 894 (E.D. La. 1998); and, 3) *Bayou Fleet v. Alexander*, 1997 WL 625492 (E.D. La. 1997). The first and third district court opinions are reprinted in the appendix.

JURISDICTION

The Court of Appeals' judgment was entered on November 28, 2000. Petitioner now invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States of America provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Fed. R. Civ. Pro. 8(c) provides: "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

STATEMENT OF THE CASE

On July 14, 1997, petitioner, Bayou Fleet, Inc. (hereinafter "Bayou Fleet"), filed a § 1983 lawsuit against respondents, Neal Clulee, Mary Clulee and their company,

Home Place Batture Leasing, Inc. (hereinafter "the Clulees"), and against Ellis Alexander, individually and in his official capacity as a council member of the St. Charles Parish Council. Subject matter jurisdiction in the trial court was based upon 28 U.S.C. § 1331 and § 1343. In general, the lawsuit alleged that the Clulees and Mr. Alexander conspired or jointly participated in a scheme to eliminate Bayou Fleet as a business competitor of the Clulees by baseless challenges to the non-conforming zoning status of Bayou Fleet's property and by attempting to prevent the issuance of permits to Bayou Fleet and its lessee, Ronald Adams Contractors, Inc. (hereinafter "Ronald Adams").[1]

On September 23, 1997, Bayou Fleet amended its lawsuit seeking injunctive and declaratory relief to prevent the enforcement of two unconstitutional acts of the St. Charles Parish Council (hereinafter "Parish Council") which were sponsored by Mr. Alexander. That legislation was introduced in retaliation against Bayou Fleet for its filing of this lawsuit and also to advance the object of the conspiracy to put Bayou Fleet out of business. The amended lawsuit also added St. Charles Parish (hereinafter "the Parish") as a defendant.[2]

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[1]For more detail on the facts, see the recitations of facts in the lower courts' decisions. Those decisions are contained in the Appendix (Appendix A-C).

[2]Bayou Fleet amended its lawsuit an additional time to add the Clulees' other company, N/C Materials, Inc., as a defendant when it discovered that they had involved it in the conspiracy. In this application, N/C Materials is a respondent and is included in the phrase "the Clulees."

One of the aforesaid unconstitutional acts was the Special Legal Counsel Resolution. It created a Special Legal Counsel that was charged to investigate the non-conforming zoning status and uses of Bayou Fleet's property. Mr. Alexander proposed that the Clulees' attorney, Joel T. Chaisson, become the Special Legal Counsel. The other unconstitutional act was the Levee Law Ordinance. That ordinance made it a criminal act for Bayou Fleet to cross the Mississippi River levee to access its property unless it had written permission from the Parish Council.

The district court scheduled a trial for September 30, 1997, to take up the merits of Bayou Fleet's request for a permanent injunction and declaratory judgment. The Clulees and their attorneys attended and participated in that trial. On October 7, 1997, the district court issued its decision and declared that both acts were unconstitutional.[3] In order to arrive at that decision, the district court ruled that Bayou Fleet's property had maintained its non-conforming zoning status which had grandfathered its use for sand pits, a ship yard and a rock yard. See, Appendix B.

In order to remedy the official conduct which had produced the aforesaid unconstitutional acts, Bayou Fleet and the Parish entered into a settlement agreement which was contingent upon the Parish Council's approval of a joint stipulation which recognized the three non-conforming

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[3]In so ruling, the district court held that the Special Legal Counsel Resolution "was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet." See, Appendix B.

uses (sand pits, a ship yard and a rock yard) of Bayou Fleet's property and the entry of a partial consent judgment which incorporated the terms of that joint stipulation. A resolution seeking that approval was taken up by the Parish Council on January 19, 1999. The Parish Council voted 6-2 in favor of the resolution approving the settlement and the joint stipulation. On January 20, 1999, Bayou Fleet, the Parish and Mr. Alexander filed a joint motion for entry of the partial consent judgment. The district court granted that motion and entered the partial consent judgment.

The Clulees then filed a motion for new trial seeking to alter the partial consent judgment. Specifically, the Clulees asked the district court to eliminate from that judgment the Parish's legislatively approved stipulations recognizing the three non-conforming uses of Bayou Fleet's property. On February 11, 1999, the district court heard argument on the Clulees' motion. At the conclusion of the argument, the district court granted the motion and struck from the partial consent judgment the first seven stipulations, which included the Parish's official recognition of the three non-conforming uses of Bayou Fleet's property. The district court took that action even though it had previously ruled on the merits that Bayou Fleet's property had maintained its non-conforming zoning status.

At the conclusion of that hearing, the district court *sua sponte* ordered the parties to submit memoranda on whether the Clulees were entitled to a dismissal of Bayou Fleet's lawsuit on the basis of *Noerr-Pennington* immunity, even though they had not urged that defense in their answer or in a motion to dismiss or motion for summary judgment. The parties filed their memos and the case went to trial on February 22, 1999.

After the trial commenced, on February 25, 1999, the Clulees filed a motion to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense. On the final day of trial, the district court denied that motion stating that it was filed "way after" the deadline "without any explanation" for its "tardiness."

On February 18, 1999, four days before trial, the Clulees filed a motion for summary judgment which sought a dismissal of the lawsuit on the basis of *Noerr-Pennington* immunity. At the conclusion of the trial, the district court denied that motion from the bench. The law clerk then, in open court and on the record, countermanded that ruling stating that "the merits of the motion will be addressed in the opinion."

On September 30, 1999, the district court issued its decision on the merits. Even though the district court had ruled during trial that the Clulees were not entitled to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense, Bayou Fleet's § 1983 lawsuit was dismissed on the basis of that defense. See, Appendix C.

On October 25, 1999, within thirty days of the district court's judgment, Bayou Fleet filed its notice of appeal. Thus, Bayou Fleet's appeal was timely and the appellate court's exercise of jurisdiction pursuant to 28 U.S.C. § 1291 was proper.

On November 28, 2000, the appellate court issued its opinion. With regard to *Noerr-Pennington* immunity, the appellate court held that: (1) it is a proper defense in a § 1983 lawsuit; (2) it is a proper defense in a § 1983 lawsuit even though part of the claim involves retaliation against the plaintiff for its exercise of its First Amendment

right of access to the courts; (3) a conspiracy/joint participation exception to *Noerr-Pennington* immunity does not exist in a § 1983 conspiracy/joint participant lawsuit; and, (4) even though the district court denied the Clulees' motion for leave to amend their answer in the middle of trial to raise it as an affirmative defense, it was nevertheless permissible for the district court to dismiss Bayou Fleet's lawsuit based upon the *Noerr-Pennington* immunity defense. See, Appendix A.

Even though the appellate court found that the law clerk's participation in the non-jury trial was "unusual", "troubling" and "unfortunate", it refused to order a new trial. Finally, the appellate court refused to reverse the district court's modification of the partial consent judgment despite the fact that Bayou Fleet had raised that issue in its complaint and the lower court had ruled after a trial on the merits that Bayou Fleet's property had maintained its non-conforming zoning status. See, Appendix A.

REASONS FOR GRANTING THE WRIT

A. Introduction

Congress wisely enacted legislation to prevent antitrust conspiracies. This Court has generally upheld the validity of that legislation, but did create one exception known as *Noerr-Pennington* immunity which protects a citizen's First Amendment right to petition public officials, irrespective of the petitioner's anti-competitive intent. Without any guidance from this Court, some of the lower appellate courts, including the Fifth Circuit, have extended the *Noerr-Pennington* immunity defense to § 1983 civil rights actions. It has proved to be the proverbial round peg in a square hole - it simply does not fit.

At least when the appellate courts were extending *Noerr-Pennington* immunity to § 1983 civil rights cases they attempted to ameliorate much of the mischief by recognizing an exception in cases of illegal conspiracies, equating them to what was perceived to be a parallel conspiracy exception to *Noerr-Pennington* immunity in antitrust cases. However, this Court in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) found that there was no conspiracy exception to *Noerr-Pennington* immunity. The instant case is an example of the anomaly that has resulted.

The petitioner's First Amendment right of access to the courts has been trumped by the respondents' First Amendment right to petition the government. The import of the Fifth Circuit's decision in this case has enormous potential for harm, and undermines many decisions of this Court protecting § 1983 victims from illegal conspiracies between private citizens and public officials acting under color of state law. Writs should be granted to examine and correct this situation.

B. Argument

1. Whether *Noerr-Pennington* immunity can be extended beyond Sherman Act antitrust claims to include civil rights claims under Section 1983?

Beginning with *Eastern Rail. Pres. Conf. v. Noerr Motor Frgt., Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), this Court developed what has come to be known as the *Noerr-Pennington* immunity defense. The foundation of that immunity is that "[t]he federal antitrust laws . . . do not regulate the conduct of private individuals

in seeking anticompetitive action from the government." *Omni Outdoor Advertising, Inc.*, 499 U.S. at 379-80, 111 S.Ct. at 1354. "[*Noerr-Pennington*] . . . rests ultimately upon a recognition that the antitrust laws, tailored as they are for the business world, are not at all appropriate for application in the political arena." *Id.* at 380.

Since the advent of the *Noerr-Pennington* immunity defense, lower federal courts have extended *Noerr-Pennington* immunity so far beyond its intended application in the field of antitrust law that it now immunizes § 1983 defendants for conduct involving their violations of a plaintiff's federal constitutional rights. See, e.g., *Boulware v. State of Nev., Dept. of Human Resources*, 960 F.2d 793, 800 (9th Cir. 1992); *Video Intern. Production, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988).

As the lower courts were tip-toeing into the quagmire of extending *Noerr-Pennington* immunity to § 1983 cases, they recognized that such an extension created serious problems. For example, in *Video Intern. Production, Inc., supra*, the court acknowledged that:

> The section 1983 claim presents more difficulty, although we ultimately arrive at the same result. The difficulty arises from the fact that section 1983 itself protects constitutional rights, so our reasoning must involve a more careful balancing of interests.

Id. at 1084. However, the court believed that it could handle the required "balancing of interests" with the availability of the conspiracy exception to *Noerr-Pennington* immunity.

> We think that if Noerr-Pennington is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with Noerr-Pennington.

Id. at 1084.

The problem is that after the lower courts got knee deep in the "quagmire", this Court eliminated that which gave them comfort in believing that they could balance the competing interests in a § 1983 case. See, *Omni Outdoor Advertising*, 499 U.S. at 382-84, 111 S.Ct. at 1355-56. The irony is that the Fifth Circuit, in rejecting the conspiracy exception in this case, did so on the basis that this Court has never recognized it. See, Appendix A. Of course not, because this Court has never recognized that *Noerr-Pennington* immunity was applicable in a § 1983 case to begin with.

In effect, the application of *Noerr-Pennington* in § 1983 cases, has elevated one citizen's federal constitutional rights (the right to petition the government) over that of another's (the right of access to the courts), which has its own basis in the First Amendment. If the law should hold that a constitutional right which one person might have must be preferred over that of another's, the law will have simply abdicated to whim and caprice. This cannot occur consistently with an expectation of preserving our individual freedoms.

This Court has never addressed the issue of whether *Noerr-Pennington* immunity is an available defense in a §

1983 case.[4] The time has come for that to occur. This issue cries out for review and the lower courts have acknowledged that they have received "scant guidance" from this Court. See, e.g, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir. 2000). Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

2. Whether *Noerr-Pennington* immunity should protect a defendant in a Section 1983 case who retaliates against the plaintiff for exercising its First Amendment right to petition the federal courts?

When the district court ruled that the Special Legal Resolution was unconstitutional, it also held that it "was proposed in retaliation for the filing of this suit, and with a bad faith intent to injure Bayou Fleet." See, Appendix B. In filing this lawsuit, Bayou Fleet engaged in a form of political expression entitled to First Amendment protection. *In re Primus*, 436 U.S. 412, 428, 98 S.Ct. 1893, 1902, 56 L.Ed.2d 417 (1978). This protection forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. *Perry v. Sinderman*, 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972).

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[4]Without directly holding that *Noerr-Pennington* immunity does not apply outside the field of antitrust law, in *Omni Outdoor Advertising*, this Court permitted a state law trade libel claim to go forward despite granting *Noerr-Pennington* immunity on the federal antitrust claim. *Omni Outdoor Advertising*, 499 U.S. at 384, 111 S.Ct. at 1356.

Bayou Fleet argued on appeal that even if *Noerr-Pennington* immunity applied on a § 1983 claim, nevertheless, it would not immunize the Clulees on the retaliatory sanctions which occurred following the filing of this lawsuit.[5] In rejecting that argument, the appellate court stated:

> Bayou Fleet claims that *Noerr-Pennington* cannot be used to illegally abridge the rights of other citizens. The Supreme Court has not established a separate exception to the *Noerr-Pennington* doctrine for retaliatory intent, and we decline to create a new exception here.

See, Appendix A.[6]

While this Court has never directly addressed that issue, it did hold in *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985), that:

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[5]In addition to the Special Legal Counsel resolution, Bayou Fleet also contended that the Levee Law Ordinance and tax audit were in retaliation against it for filing this lawsuit.

[6]As previously noted, the fallacy in the Fifth Circuit's reasoning is that this Court has never recognized *Noerr-Pennington* immunity as a defense in a § 1983 case. Obviously, it could not have created an exception to a rule it had never established.

> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions. (citations omitted)

Id. at 472 U.S. 485, 105 S.Ct. 2791.

In essence, the appellate court's ruling below created an absolute immunity for the Clulees by elevating whatever First Amendment rights they might have had under the rubric of *Noerr-Pennington* over the clear First Amendment right of Bayou Fleet to file a lawsuit without the imposition of retaliatory sanctions. That result further underscores the impossibility of properly applying an immunity created for antitrust law to § 1983 litigation and the numerous constitutional issues which arise therein. Nevertheless, even if this Court concludes that the *Noerr-Pennington* immunity defense can be applied in a § 1983 case, it should not follow that it can trump the federal constitutional rights of the § 1983 victim. Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

3. Whether *Noerr-Pennington* immunity should protect a defendant involved in a Section 1983 civil rights conspiracy?

The appellate court held that a conspiracy exception to *Noerr-Pennington* immunity does not exist in a § 1983 case. The appellate court reached that conclusion by extending to this § 1983 case, this Court's opinion in *Omni Outdoor Advertising*, *supra*, wherein the conspiracy exception to *Noerr-Pennington* immunity was rejected. However, as previously noted that was only in the context of an antitrust case. *Omni Outdoor Advertising*, 499 U.S. at 382-84, 111 S.Ct. at 1355-56.

Section 1983 litigation requires a showing that the defendant acted under color of state law. A private party may be reached in a § 1983 case if the plaintiff is able to establish a conspiracy or joint action with the state or its agents. In *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), this Court stated:

> As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions.

Id. at 449 U.S. 27-28, 101 S.Ct. at 186. See also, *Adickes v. S.H. Kress*, 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Eliminating the conspiracy exception to the *Noerr-Pennington* immunity defense in § 1983 litigation is tantamount to tacitly overruling the aforesaid under color of state law standard because it will narrow civil rights relief to direct state action only. Due to the very nature of the standard, which requires interaction between a state actor and a private person, it is not difficult to envision that in each conspiracy or joint action situation a private person would simply claim *Noerr-Pennington* immunity because his or her conduct involved some degree of speech. In effect, allowing the appellate court's decision to stand would promote civil rights conspiracies between a private person and a state actor because the private person would know that he or she could engage in a conspiracy or joint action without fear of liability if the secret agreement is ever discovered.[7]

Finally, permitting a conspiracy exception to *Noerr-Pennington* immunity in § 1983 litigation would promote the purposes of the statute. Section 1983 was designed as comprehensive, remedial legislation for the deprivation of federal constitutional and statutory rights. "For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury or oppression." *United States v. Classic*, 313 U.S. 299, 324, 61 S.Ct. 1031, 1042, 85 L.Ed. 1368 (1941). Therefore, petitioner

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[7]The state actor already has little, if any, fear of liability because of the wide range of available immunity defenses, including absolute immunity for local legislators. See, *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998).

respectfully submits that this Court should grant this writ application to examine this issue.

4. Whether a lawsuit can be dismissed on the basis of *Noerr-Pennington* immunity after a ruling is issued during trial prohibiting the defendants from amending their answer to allege it as an affirmative defense?

The Clulees did not assert the *Noerr-Pennington* immunity defense, or any other immunity defense, in their original answer or in their answers filed in response to Bayou Fleet's first and second supplemental and amending complaints. Likewise, they did not raise the *Noerr-Pennington* immunity defense in a motion to dismiss or motion for summary judgment filed as their first response to the original or amended complaints.

After the trial commenced, the Clulees filed a motion for leave to amend their answer to raise *Noerr-Pennington* as an affirmative defense. On the final day of trial, the district court ruled from the bench and denied that motion on the basis that it was filed "way after" the deadline for amending pleadings "without any explanation" for its "tardiness." Nevertheless, when the district court issued its opinion on the merits, it dismissed Bayou Fleet's lawsuit on the basis of the *Noerr-Pennington* immunity defense. The appellate court affirmed the district court's opinion on this issue. See, Appendix A.

In *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), this Court, citing Fed. R. Civ. Pro. 8(c), ruled that a § 1983 defendant has the burden of pleading his or her qualified immunity defense. *Id.* at 446 U.S. 640, 100 S.Ct. 1924. See also, *Harlow v. Fitzgerald*,

457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), this Court ruled that if a defendant fails to plead an affirmative defense as required by Rule 8(c), then it is waived unless the district court permits an amendment of the answer. *Id.* at 401 U.S. 329-334, 91 S.Ct. 801-803.

The district court ruled during trial that the Clulees could not amend their answer to raise the *Noerr-Pennington* immunity defense, but it then dismissed Bayou Fleet's lawsuit on that basis. If Rule 8(c) is to have any meaning, it should stand for the proposition that when a district court denies a party leave to amend its pleadings to raise an affirmative defense, it cannot then decide the case on the basis of the defense which it did not allow. Otherwise, the appellate court's decision permitting that outcome is tantamount to a sanctioning of the judicial erasure of that rule from the Federal Rules of Civil Procedure. Therefore, petitioner respectfully submits that this Court should grant this writ application on this issue and summarily reverse the appellate court's decision holding that the *Noerr-Pennington* immunity defense was not waived.[8]

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[8]Because the Fifth Circuit ruled that the Clulees were entitled to a dismissal of Bayou Fleet's lawsuit on the basis of *Noerr-Pennington*, it did not rule on the other issues which Bayou Fleet raised pertaining to the proof of the civil rights conspiracy/joint participation scheme. Bayou Fleet submits that if this Court rules in its favor and finds that *Noerr-Pennington* immunity is not applicable or available as a defense, then it should remand the matter to the appellate court for further proceedings to address and rule on those undecided issues.

5. Whether a law clerk's improper participation in a non-jury trial creates an appearance of impropriety which deprives a litigant of meaningful access to the federal courts justifying a new trial?

While Bayou Fleet believes that the *Noerr-Pennington* immunity issues are the primary reasons that writs should be granted, there was a serious breach in the district court that also justifies this Court's attention. On appeal, Bayou Fleet argued that it was entitled to a new trial because of conduct of the district court's law clerk during the non-jury trial which created plain error that was so substantial it deprived Bayou Fleet of meaningful access to the courts. The appellate court rejected that argument despite finding that the law clerk's participation in the non-jury trial was "unusual", "troubling", and "unfortunate." See, Appendix A.

While Bayou Fleet is a closely held family corporation its president and major shareholder, Robin Durant, was present throughout the trial in the district court as the company representative. He was astonished to see the law clerk, in effect, presiding at the trial. She directed the district court judge on when to proceed, how to proceed and even countermanded one of his rulings. Much of the conduct was subtle and does not appear in the record. However, there was a sufficient portion of it that was of record to constitute plain error that should have required a reversal by the appellate court.

For instance, at the beginning of the trial the following colloquy occurred:

(Defense Attorney) . . . you had requested that we submit a memorandum regarding the Noerr-Pennington doctrine, which we both submitted in that regards. Did the court feel it appropriate to address that issue, or do you just want to proceed?

(Court) I want to go ahead and proceed and I'll let you know something on that by 1:30 today.

(Defense Attorney) Thank you, Your Honor.

(Law Clerk) Judge, there is no way we can rule on it by 1:30 today because I am sitting in the courtroom right now.

(Court) It will have to be later.

The client was amazed, believing that in a bench trial a judge listened to the testimony and a law clerk worked in chambers researching pending legal issues in the trial. Instead, the law clerk in this case could not research a pending legal issue (*Noerr-Pennington*) which, if correctly found to be in favor of the Clulees, would have altogether eliminated the need for a trial, because she needed to be in court to listen to the testimony and review the evidence, in the same manner as the judge. In fact,

during the trial the law clerk questioned witnesses. In addition, the trial had to be suspended for a number of days because the law clerk wanted to take a break so that she could travel out of town and visit her mother. Rather than continue to hear testimony in the law clerk's absence, the trial judge recessed the trial so that the law clerk could travel out of town and visit her mother.

When the trial resumed, the trial judge ruled on and denied the Clulees' motion for leave to amend their answer to raise *Noerr-Pennington* immunity as an affirmative defense. However, at the end of that day, the trial judge attempted to rule on a motion for summary judgment on *Noerr-Pennington* immunity which the Clulees had filed only four days before the trial. That ruling follows:

(Court) The motion of defendant's Mr. and Mrs. Clulee and Home Place Batture Leasing, N/C Materials for Summary Judgment is denied. The reasons will be given.

(Law Clerk) Judge, it's not that the merits are denied, it's denied because they set it after the trial. The merits of the motion will be addressed in the opinion.

(Court) The merits of the motion are going to be addressed in the opinion . . . .

Mr. Durant and Bayou Fleet were stunned to say the least. A law clerk had just countermanded a ruling of a federal judge. He had denied a motion for summary judgment on *Noerr-Pennington* immunity. That denial was consistent with his order earlier that same day when he ruled that the Clulees could not amend their answer to raise *Noerr-Pennington* as an affirmative defense. But apparently, the law clerk had decided that a ruling was going to be issued on the merits of *Noerr-Pennington* immunity and she changed the federal judge's ruling denying the motion for summary judgment.

This Court has repeatedly stated that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Clearly, conduct and participation of court staff during a non-jury trial, that the appellate court described as "unusual", "troubling", and "unfortunate", does not satisfy the appearance of justice. Further, it damages the purity of the judicial process and its institutions thereby requiring a reversal and a new trial.

The right of access to the courts has been characterized by this Court in the following terms:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142,

148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907). "The right of access . . . is designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief." *Crowder v. Sinyard*, 884 F.2d 804, 814 (5th Cir. 1989).

"Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct. These expectations extend to those who make up the contemporary judicial family, the judge's law clerks and secretaries." *Hall v. Small Business Admin.*, 695 F.2d 175, 176 (5th Cir. 1983). In this case, there was clear record evidence which created an appearance that the judge's law clerk, and not the court, was making a determination on whether Bayou Fleet's claim was meritorious. Thus, Bayou Fleet's right of access was not meaningful and the appearance of justice was not satisfied. Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

6. Whether, after a trial, a partial consent judgment can be modified by the district court based upon the lack of consent of a party?

The appellate court rejected Bayou Fleet's argument that the district court's modification of the partial consent judgment should be reversed. The appellate court based its decision on the mistaken belief that Bayou Fleet had not raised the issue of whether its property had maintained its non-conforming zoning status for sand pits, a ship yard and

a rock yard. That was a primary issue in the case which Bayou Fleet had alleged in its amended complaint seeking a declaration that the Special Legal Counsel Resolution and Levee Law Ordinance were unconstitutional.

The appellate court also rejected Bayou Fleet's argument on the basis of its mistaken belief that Bayou Fleet introduced the partial consent judgment in a state court lawsuit which the Clulees had filed. Bayou Fleet did not do that and could not have done that because it was not a party in that lawsuit. The appellate court also stated that the Clulees' state court lawsuit was filed to determine whether Bayou Fleet's property had maintained its non-conforming zoning status. That is also incorrect. The Clulees' state court lawsuit was a mandamus action which sought to have the state court prevent the Parish Council from voting on whether it should approve the settlement in this case.

What is most troubling about the appellate court's decision on this issue is that it completely disregarded the trial on the merits (which the Clulees participated in) wherein the district court ruled that Bayou Fleet's property had maintained its non-conforming status. In so ruling, the appellate court disregarded settled law, particularly this Court's opinion in *Local No. 93 v. City of Cleveland,* 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986).

In *Local No. 93*, this Court ruled that a court may enter a consent decree despite the objections and lack of consent of a party. Specifically, this Court stated that:

> It has never been supposed that one party--whether an original party, a party that was joined later, or an intervenor--could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

Id., 478 U.S. at 528-29, 106 S.Ct. at 3079.

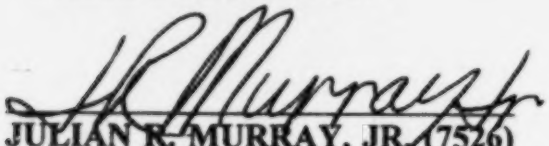
With the Clulees involvement and participation, the district court ruled that Bayou Fleet's property had maintained its non-conforming status. See, Appendix B. Once those findings were made, the only plausible basis for modification of the partial consent judgment was the Clulees' lack of consent. However, as clearly announced by this Court in *Local No. 93*, that reason cannot stop the entry of such a decree. Otherwise, it would work a significant deterrence contrary to the federal policy of encouraging settlement agreements. See, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 213-15, 114 S.Ct. 1461, 1468, 128 L.Ed.2d 148 (1994) ("Public policy wisely encourages settlements."). Therefore, petitioner respectfully submits that this Court should grant this writ application to examine this issue.

CONCLUSION

For the foregoing reasons, petitioner, Bayou Fleet, Inc., prays that this Court grant this application for writ of certiorari to examine the issues presented herein, and in the event of a ruling on the merits in favor of petitioner, that the matter then be remanded to the United States Fifth Circuit Court of Appeals for further proceedings.

Respectfully submitted:

CHEHARDY, SHERMAN, ELLIS, BRESLIN & MURRAY



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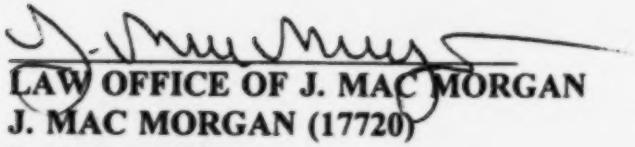

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